Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELAINE ZEE, Individually and as Plan Administrator of LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; BRUCE BELFER; LINDA MERLING; MARC BELFER and LIGHTING WORLD, INC.,

Petitioners,

vs.

CORINNE BELFER, as Executrix of the Estate of Norbert S. Belfer, Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should an act of Congress — here the "Retirement Equity Act of 1984", P.L. 98-397, 99 Stat. 1426 (1984) — which was adopted to protect and preserve the rights of divorced women and children in their spouse's and father's pension plans through the vehicle of a "qualified domestic relations order" ("QDRO"), be strictly applied in all cases so as to frustrate the clear intent of a "domestic relations order" ("DRO") incorporated into a Property Settlement Agreement, which expressly was intended by the contracting spouses to benefit those children?

2. Should the unambiguous terms of a qualified profit-sharing plan be read in conjunction with the terms of a DRO in order to qualify the DRO as a QDRO under ERISA?

PARTIES TO THE PROCEEDING

All parties named in the caption are parties to this proceeding, with the exception of: (i) Norbert Belfer, deceased; and (ii) Delaware Charter Guarantee & Trust Company, Trustee of Lighting World, Inc. Employees Profit-Sharing Plan which, as outside trustee of the plan, has agreed to abide by whatever determination is made by the Court.[1]

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Lighting World, Inc., has no parent companies and no nonwholly owned subsidiaries.

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1. It is noted that consistent with the caption adopted by the Third Circuit Court of Appeals, the caption herein refers to Corinne S. Belfer in the singular capacity as Executrix of the Estate of Norbert Belfer, deceased. However, this is the result of a clerical error below insofar as Respondent sued in her individual capacity as well as that of Executrix.

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Petitioners, Elaine Zee ("Elaine"), individually and as Plan Administrator of the Lighting World, Inc. Employees Profit-Sharing Plan (the "Plan"), Bruce Belfer ("Bruce"), Linda Merling ("Linda"), Marc Belfer ("Marc") and Lighting World, Inc. ("Lighting World" or the "Company;" and collectively, the "Petitioners"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Third Circuit (the "Court of Appeals") in *Belfer v. Zee, et als.*, Nos. 97-5725 and 98-5153, was filed on September 22, 1998 (App. A). The unreported opinion of the United States District Court for the District of New Jersey (the "District Court") in *Belfer v. Zee, et al.* Civil No. 97-1445, was filed on September 24, 1997 (App. C).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1998 (App. B). The Court of Appeals denied a timely petition for rehearing on October 23, 1998 (App. E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case addresses the application of certain provisions of 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the "Retirement Equity Act of 1984," P.L. 98-397, 99 Stat. 1426 (1984) ("REA"). Section 1056 of ERISA provides, in relevant part, as follows:

> (d) Assignment or alienation of plan benefits
>
> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated. . . .

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph —

(i) the term "qualified domestic relations order" means a domestic relations order —

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies —

(i) The name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) The amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) The number of payments or period to which such order applies, and

(iv) Each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order —

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate

> payee under another order previously determined to be a qualified domestic relations order. . . .
>
> (K) The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

STATEMENT OF THE CASE

The fundamental question of national importance presented by this case is whether courts are constrained to exalt form over substance in resolving disputes concerning the proper application of ERISA, when doing so would do violence to the very intent of Congress in adopting the REA, which provides for an exception to ERISA's general prohibition against assignment and alienation of plan benefits, in favor of a participant's spouse, former spouse, child or other dependent pursuant to a QDRO.

In this case, despite the clearly expressed intentions of a divorcing husband and wife to effectuate a QDRO sufficient to effect an *in toto* assignment of their profit-sharing plan benefits to their children in lieu of equitably distributing such benefits among themselves, the District Court and Court of Appeals, while acknowledging the contractual intent of the parties, nonetheless awarded those benefits to the husband's new spouse (instead of the children) because of alleged technical deficiencies found to exist in the DRO.

The District Court and the Court of Appeals found that the subject DRO did not meet all of the technical requirements of a QDRO, in that the DRO failed to specify "[t]he number of payments or period to which such order applie[d]," as required by 29 U.S.C. § 1056(d)(3)(C)(iii). Because the Courts below believed that they were constrained by Congress to apply the provisions of the REA strictly, they found that the DRO did not constitute a

QDRO and awarded the subject Plan benefits to the deceased Respondent's new spouse, in lieu of the children, the intended beneficiaries of those benefits. In so ruling, the courts below refused to recognize any meaningful distinction between DROs which were intended to create only a partial assignment or apportionment of Plan benefits to an alternate payee, as opposed to a DRO, such as was presented at bar, which effected, and was found to have been intended to effect, a mere substitution of beneficiaries under the Plan (*i.e.*, the alternate payees for the participants) and to insure that those alternate payees (instead of the participants) would receive all of the benefits which otherwise would have been payable to the participants in the absence of the QDRO, as and when those benefits would become payable, and in the form which they were to become payable, in accordance with the Plan documents. The courts below refused to read the unambiguous terms of the subject Plan together with and into the DRO in order to supply the allegedly missing term so as to qualify the DRO as a QDRO, in the process frustrating the contractual intent of the parties.

The issue of compelling national interest and public policy presented by the within matter concerns the apparent clash between the important national policy reflected in and by ERISA's anti-alienation provisions, and the clear purpose of the REA which was, and remains, to insure that divorcing women and their children receive the pension benefits to which they are entitled by operation of a State's domestic laws. To fully appreciate the significance of the issues presented by the case, it is essential to consider its lengthy factual and procedural background.

A. The Matrimonial Action: Background of the Underlying Dispute

The underlying action originally was brought by Norbert S. Belfer ("Norbert") and then subsequently continued by Norbert's surviving spouse and Executrix, Corinne S. Belfer ("Corinne"), to compel the distribution of Norbert's profit-sharing account in

Lighting World, which was a small, family-owned and operated lighting manufacturing business, in which Norbert and Linda owned all of the shares of stock, and their children worked.

In 1988, Norbert and Linda became embroiled in a nasty two-year divorce proceeding (the "Matrimonial Action"), emanating out of the termination of a thirty (30) year marriage and long-term economic partnership. The marriage produced indisputably two remarkable benefits — three bright and energetic children, petitioners Bruce, Elaine and Marc (collectively, the "Children"); and a successful business (Lighting World) to provide for the Children's future. Both Norbert and Linda were represented in the Matrimonial Action by experienced matrimonial lawyers.

At the time of the Matrimonial Action, the business (Lighting World), and Norbert's and Linda's sizeable accounts in the Company's Profit-Sharing Plan, constituted the principal elements of "marital property" which were subject to equitable distribution under New Jersey domestic relations law. With respect to the Company, at the time of the Matrimonial Action, Norbert owned only one (1) share of Lighting World's stock and Linda owned twenty-nine (29) shares. From a purely legal viewpoint, therefore, Linda held the "controlling" shares of Lighting World. In addition, Lighting World was a profitable company, with substantial assets and retained earnings, and both Norbert and Linda placed a substantial dollar value upon their interests therein.

Rather than litigating the Matrimonial Action to its conclusion and facing the consequences of court-imposed equitable distribution, Linda and Norbert negotiated a "Property Settlement Agreement" (the "PSA"), in which they mutually provided for the future of the Children and Lighting World. The PSA was executed on August 24, 1990. The reasons for executing the PSA were all too clear. Were the parties in the Matrimonial Action to have proceeded to a litigated disposition (as opposed to a negotiated solution), the family court would have been *compelled* to equitably distribute the stock in Lighting World, the real property on which

the Company was situate and the Plan assets, thereby materially affecting the Children's future.

Thus, as of the date the PSA was executed, Norbert was faced with the following choices: (a) to litigate the Matrimonial Action to its conclusion, in which case (i) Linda might have been awarded a controlling stock interest in Lighting World, together with a right to substantial alimony and counsel fees, among other emoluments of the parties' thirty-year marriage, including the equitable distribution of Norbert's interest in the Plan or (ii) Linda and Norbert might have been found each to have been entitled to a 50% stock interest in Lighting World, thereby requiring the Family Court to order Norbert to buy-out Linda's shares at "fair value," and requiring a substantial dollar payment to her by Norbert, which could not have occurred without mortgaging the Children's or the business' future; or (b) Norbert could resolve the Matrimonial Action by a way of a negotiated settlement, which would avoid a mandated court-ordered buy-out of Linda's shares in the Company. Norbert opted for the latter solution, and the PSA was executed settling the Matrimonial Action.

(i) *An Overview of the PSA*

In the fourth "Whereas" clause of the PSA, Norbert and Linda stated their clear intentions in executing and adopting its terms:

> to make arrangements in connection with their living separate and apart, *including the settlement of their property rights* . . . and the support and maintenance of the husband and wife; and all other rights and obligations growing out of the marriage relationship . . .

(Emphasis supplied).

In the following twenty-four (24) pages of the PSA, these sophisticated parties (with the assistance of counsel) laid out in meticulous detail their vision as to the future ownership, operation, management and control of the "marital property" which they had

accumulated during their thirty-year marriage, including the substantial accrued Plan benefits in their respective profit-sharing accounts. In so doing, Linda irrevocably surrendered her rights not only to alimony and support, but most significantly (and substantially) to her right: (a) to receive what likely would have been a sizeable equitable distribution award from Norbert, representing her marital interests in Lighting World and in the real property on which the business was situate; and (b) to an equitable distribution of Norbert's Plan benefits.

In consideration of foregoing these substantial emoluments of marriage under New Jersey's Equitable Distribution Act, Linda insisted upon and received a property distribution plan which insured the continued survival of Lighting World (without a forced judicial dissolution or involuntary buy-out), the orderly operation of its business, and the disposition of the primary assets of the marriage — to wit, Lighting World, the real property on which it was situate and of Norbert's and her accrued Plan benefits — to the Children.

(ii) *Norbert's Irrevocable Creation and Recognition of the Children's Right to Receive the Subject Plan Benefits*

In Article 7 of the PSA, Norbert and Linda agreed as follows:

> The parties specifically waive any and all right that they may have in the other's employee profit sharing plan as of the date of this agreement. *Each party shall make the three children born of the marriage equal co-beneficiaries, per stirpes of his/her respective employee profit sharing plan.* The employee benefit plan is known as Lighting World, Inc. Employee Sharing Trust Fund.

(Emphasis supplied). In so doing, Norbert and Linda irrevocably, absolutely and unconditionally agreed to designate the Children as "alternate payees" of their respective Plan benefits *in toto*, and "created" and/or "recognized" the Children's right, as equal

alternate payees, to receive *all* of those benefits instead and in lieu of their parents. *See* 29 U.S.C. § 1056(d)(3)(B)(i).

The "Defined Contribution Plan and Trust/Custodial Account" sponsored by Central Jersey Bank & Trust Company, which was the particular Plan document in effect at the time of execution of the PSA, provided as follows:

- "An alternate payee is a . . . *child* . . . who is treated as a *beneficiary* under the Plan as a result of the Qualified Domestic Relations Order" (emphasis supplied);
- A "designated *beneficiary* is an individual designated as the *beneficiary* under the Plan in accordance with [IRC] Section 401(a)(9). . . ." (emphasis supplied);
- IRC §401(a)(9), subdivision (E) provides that a "designated beneficiary . . . means any individual designated as a *beneficiary* by the employee" (emphasis supplied); and
- "Once an Order is deemed a QDRO, the Plan Administrator *shall* pay to the *alternate payee(s) all* the amounts due under the QDRO. . . ." (emphasis supplied).

Thus, in 1990 at the time of the parties' divorce, Linda and Norbert irrevocably waived their equitable distribution interests in each others' Plan benefits in consideration of their express agreement that the Children, in accordance with the terms of the Plan, would be the "alternate payees" of those benefits. The parties' mutual designation of their children as "alternate payees" of their respective Plan benefits constituted, as a matter of law, an *inter vivos* assignment of those benefits, effective upon entry of the Judgment of Divorce. At the very minimum, as required by ERISA, the language of the PSA "creat[ed] or recogniz[ed] the existence of an alternate payee's [the Children] right to . . . receive all . . . of

the benefits payable with respect to a participant [Norbert] under a plan. . . ." 29 U.S.C. § 1056(d)(3)(B)(i).

(iii) *The Divorce Decree and the Post-Divorce Period (1990-1994)*

On September 4, 1990, a Judgment of Divorce was entered in the Matrimonial Action. The Judgment of Divorce provided, among other provisions, "that the interspousal agreement [PSA] between the parties be and the same is hereby incorporated herein and made a part hereof. . . ."

From September 5, 1990 through and including April 18, 1994, Norbert remained as Chief Executive Officer of Lighting World, in accordance with the terms of the PSA. Linda also continued to work for, and to draw a salary from, the Company. Bruce remained Executive Vice-President of Lighting World until March 1993, when he became President, and Elaine became its Vice President and Chief Financial Officer. The Company's Board of Directors consisted of Norbert, Linda, Bruce and Elaine, which individuals also remained (as they were at the time of entry of the PSA), Administrators of the Plan (except for Elaine who was added to the list of Plan Administrators in 1991).[1]

(iv) *The Unfortunate Events of April 19, 1994 and Norbert's Institution Of The Chancery Action*

On April 25, 1994, as a result of certain internecine disputes which had arisen concerning the operation and affairs of Lighting World and under the PSA, Norbert commenced an action against Linda and the Children in the Superior Court of New Jersey, Chancery Division (the "Chancery Action"), claiming, among other things, that he was an "oppressed minority shareholder" and that Petitioners materially had breached the PSA. The Chancery

1. At the time the PSA was executed and until March 1993, Norbert was *the* Plan Administrator with primary internal responsibility for the Plan. As CEO and President of Lighting World, Norbert signed all documents relating to the Plan, and made *all* relevant decisions affecting the Plan.

Action was intensively litigated, with numerous claims and counterclaims asserted (and legal and equitable relief sought both on an interlocutory and permanent basis) based upon claimed breaches of, or a need to interpret and declare the parties' respective rights under, the PSA. After more than two and one half years of exhaustive (and expensive) litigation before the Chancery Court, during which Petitioners were required to incur more than $600,000 in legal fees and costs in order to defend themselves against Norbert's frivolous onslaught, the Chancery Court issued two decisions, almost entirely in Petitioners' favor, in which that Court methodically reviewed the terms of the PSA, setting forth findings of fact and conclusions of law which supported the central proposition that the PSA was intended to provide for the long term success, maintenance and care of Norbert's Children and of the Company which the family had grown and nurtured over the years. Among other things, the Chancery Court found substantially all of Norbert's claims in the action to have been "frivolous;" found Norbert to have engaged in corporate misconduct; and removed him as CEO and an employee of the Company.

(v) *The Events Following The Chancery Court's Decision*

Following the conclusion of the Chancery Action, by letter dated December 4, 1996, Norbert requested a distribution of "the entire vested portion of ['his' Plan benefits]." Norbert claimed that by virtue of the Chancery Court's rulings, there had been a "termination of [his] employment" from Lighting World, and that pursuant to the unambiguous terms of the Plan, he was entitled to a lump sum distribution. Norbert's request (similar to his allegations and conduct before the Chancery Court) ignored completely the terms of the PSA.

By further letter dated December 26, 1996, Norbert again requested a distribution of "his" Plan benefits, this time based upon his claimed "disability." Again, Norbert ignored the PSA, although well aware of Petitioners' position with respect thereto.

By letter dated February 18, 1997 and after two (2) months of failed negotiations, the Plan Administrator (Elaine) responded to Norbert's December 4, 1996 "claim" letter (based upon an alleged termination of service), properly rejecting Norbert's request on four (4) separate grounds, including that pursuant to the PSA, Norbert irrevocably had assigned his Plan benefits to the Children.

By separate letter dated February 28, 1997, Elaine responded to Norbert's December 26, 1996 request for distribution (based upon his claimed permanent disability), rejecting same upon, among others, the grounds identified in her February 18, 1997 letter.

B. The Proceedings Below

Norbert's "response" to the Plan Administrator's proper rejection of his requests was the filing of the underlying litigation in this case by "emergent" Order to Show Cause (before the District Court and not before the Chancery Court which was far more familiar — indeed, for Norbert's then purposes, all too familiar — with the relevant background of the "dispute"), seeking a preliminary injunction directing the immediate distribution of "his" Plan benefits to him (and not to the Children), just prior to his passing on April 28, 1997. The District Court denied Norbert's motion.

The parties thereafter presented cross-motions for summary judgment to the District Court which were decided by its Order and Opinion filed on September 24, 1997. Although finding: (i) that "the Agreement clearly identifies [the] three children as the intended beneficiaries of the deceased's [Norbert's] benefits;" (ii) that "[t]he designation of the children as 'equal co-beneficiaries' adequately establishes that the parties intended each child to receive one-third of the subject Plan benefits . . . ;" (iii) that "Congress passed the Retirement Equity Act of 1984 . . . [t]o rectify th[e] inequitable situation" created by ERISA for "countless women who had contributed significantly to their families' financial well-being . . . ;" and (iv) while noting that

> an overly exacting application of the technical requirements for a QDRO should not be used to defeat either the explicit intentions of the parties or the Congressional intent to protect the rights of former spouses and children,

(citation omitted), the District Court nevertheless awarded the subject Plan benefits to Norbert's spouse, Corinne, despite the contrary intentions of Norbert and Linda, because the District Court found that the PSA failed to qualify as a QDRO under ERISA as it did not specify "the number of payments or period to which such order applies." 29 U.S.C. § 1056(d)(3)(C)(iii). The District Court thus concluded that the PSA, not being a valid QDRO, Norbert's designation of Plaintiff as his primary beneficiary was legally effective and that the Plan benefits should be distributed to his new spouse, Corinne. (App. C at 27a-30a).

The Court of Appeals affirmed largely for the reasons expressed by the District Court. Although the Court of Appeals: (i) recognized the significance of Congress' enactment of the REA to "safeguard the financial security of widows and divorcees;" and (ii) agreed with the District Court's determination that the parties' use in the PSA of the words "equal co-beneficiaries" clearly establishes that the Children were each intended by the parties to receive one- third of *all* of the proceeds of the Plan; it nevertheless affirmed the District Court's determination that the PSA was not a QDRO because it failed to specify the number of payments or period affected by the order. The Court of Appeals further held that that "missing" term could not be supplied either by the circumstances of the case or from the unambiguous terms of the Plan itself; this, notwithstanding its recognition that under the Plan at issue, the "number of payments" was specified as *one* (a lump sum), *and* the "period to which such order applied," *i.e.*, the dates of distribution, also were unambiguously supplied by the Plan as

payable upon Norbert's disability, retirement, termination or death. (App. A at 6a-8a).

The District Court's and Court of Appeals' "strict" interpretation of the subject DRO, without regard to the undisputed terms of the Plan to which it was appurtenant, frustrated not only the contractual intent of the parties, but congressional intent in enacting the REA. In exalting form over substance, and ERISA's general anti-alienation provisions over the specific, congressionally-mandated exception thereto set forth in the REA, the courts below established a precedent in the Third Circuit (wherein this case was one of first impression) and in other Circuits which, if applied consistently by other lower courts, would significantly eviscerate the protections afforded to divorced spouses and their children under the REA. It is for this reason and others, as discussed below, that certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW EFFECTIVELY FRUSTRATED CONGRESSIONAL PURPOSE UNDER THE REA

The petition for a writ of certiorari should be granted here because the lower courts, by adhering to a rigid, inflexible construction of ERISA's requirements to establish a QDRO, ignored not only the specific intent of the parties in negotiating and executing the PSA containing the QDRO provision, but also the explicit intent of Congress in protecting former spouses (like Linda) and their children (such as Bruce, Elaine and Marc), from precisely the conduct exhibited by husbands and their subsequent spouses (such as Norbert and then his new wife, Corinne). In its final analysis, the District Court found that the PSA in this case met all of the requirements but one to qualify as a QDRO. The Court of Appeals affirmed that determination. It respectfully is submitted that the lower courts erred in so finding because: (i) the

allegedly "missing" term was implicit in the parties' agreement itself which, unlike some QDROs, provided for a total substitution of beneficiaries (*i.e.*, the "alternate payees" for the "participant"); and (ii) to the extent such term was found to be absent from the QDRO, it was supplied by the unambiguous terms of the Plan itself which was incorporated into the QDRO.

Norbert and Linda irrevocably and unconditionally "creat[ed] or recogniz[ed] the existence of an alternate payee's [the Children's] right to . . . receive *all* . . . of the benefits . . . under [the] plan . . ." (29 U.S.C. § 1056(d)(3)(B)(i); emphasis supplied) in a PSA which settled the then pending Matrimonial Action, and which subsequently was incorporated into the Judgment of Divorce entered therein. The PSA constitutes a valid QDRO pursuant to Section 206 of ERISA, 29 U.S.C. § 1056(d)(3). The Children constitute *qualified* "alternate payees" under 29 U.S.C. § 1056(d)(3)(K). In this case, there was a complete *substitution* of beneficiaries, with Norbert and Linda transferring their respective rights as participants under the Plan to receive *all* of the Plan benefits to alternate payees, to wit, the Children.

Having been named as "beneficiaries" in the PSA ("beneficiaries" being defined by ERISA as "a person designated by a participant . . . who is or may become entitled to a benefit thereunder" — 29 U.S.C. § 1002(8)) and being deemed "beneficiaries under the Plan" (*see* 29 U.S.C. § 1056(d)(3)(J): "a person who is an 'alternate payee' under a [QDRO] shall be considered . . . a *beneficiary* under the plan"), the subject Plan benefits should have been awarded to Norbert's "alternate payees" or "beneficiaries," to wit, the Children.

The analysis begins with the provision of ERISA 29 U.S.C. § 1056(d)(1), which states "that benefits provided under the plan may not be assigned or alienated." Thus, in the absence of an exception to ERISA's "spendthrift" provisions, pension benefits may not be alienated. The undeniable reason for the enactment of ERISA and the anti-alienation provisions contained therein, was

to protect and ensure "the continued well-being and security of millions of employees and their dependents who rely upon retirement plans" *Ablamis v. Roper*, 937 F.2d 1450, 1453 (9th Cir. 1991).

However, contrary to the intent of Congress and as noted by the District Court below, in accordance with ERISA's strong preemption clause, the anti-alienation provision was interpreted by numerous federal courts to preempt the efforts of states to fashion domestic relations orders that provided for the support of former spouses and children. As a result, countless women who had contributed significantly to their families' financial well-being by working in the home or otherwise, found themselves unable to obtain any pension benefits whatsoever upon divorce or death of the husband. To rectify this inequitable situation, Congress passed the REA in 1984. The REA amended ERISA in an effort primarily to safeguard the financial security of widows and divorcees (as well as their children). *Ablamis v. Roper*, *supra*. *See also Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 108 S. Ct. 2182, 2189-90, 100 L. Ed. 2d 836 (1988).

The REA put an end to the debate and conflict which theretofore had existed among the Circuit Courts as to whether ERISA preempted State domestic relations laws insofar as those laws affected pension benefits. *See Hawkins v. Commissioner of Internal Revenue*, 86 F.3d 982 (10th Cir. 1996). Pursuant to 29 U.S.C. § 1056(d)(3)(A), the "spendthrift" provisions of ERISA do not apply to *qualified* domestic relations orders.[2]

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2. 29 U.S.C. § 1056(d)(3)(A) provides, in relevant part, as follows:

> [The "spendthrift" provision] shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. *Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.* (emphasis supplied).

The REA thus created a limited exception to the spendthrift provision of ERISA that permits qualified pension plan benefits to be divided pursuant to qualified domestic relations orders. *Hawkins v. Commissioner*, *supra*, 86 F.3d at 989. *See also Stephen Allen Lynn, P.C. Employee Profit Sharing Plan and Trust v. Stephen Allen Lynn, P.C.*, 25 F.3d 280 (5th Cir. 1994). The purpose of the REA aptly was noted by one court which stated, [t]he "draftsmen of the [REA] were concerned with the financial security of the spouses and other survivors of employees who died enrolled in ERISA plans." *Metropolitan Life Insurance Company v. Wheaton*, 43 F.3d 1080, 1083 (7th Cir. 1994).

A "domestic relations order" is defined by ERISA as

> any judgment, decree or order (including approval of a property settlement agreement) which (i) relates to . . . marital property rights to a spouse, former spouse [or] *child* . . . of a participant, and (ii) is made pursuant to a State domestic relations law. . . .

(Emphasis supplied). The PSA herein, which was "approved" by (and incorporated into) the terms of the Judgment of Divorce between Norbert and Linda, constitutes a "domestic relations order." *See, e.g., Hawkins v. Commissioner*, *supra* (provisions of Marital Settlement Agreement "incorporated by reference into final marital dissolution decree," constitute a QDRO).

In order to constitute a "*qualified* domestic relations order" or QDRO, a domestic relations order first must:

> *creat*[*e*] *or recogniz*[*e*] the existence of an alternate payee's right to, or assig[n] to an alternate payee the right to, receive *all* or a portion of the benefits payable with respect to a participant under a plan. . . . 29 U.S.C. §1056(d)(3)(B)(i)(I). (emphasis supplied).

An "alternate payee" is defined by 29 U.S.C. § 1056(d)(3)(K) to include

> any . . . *child* . . . of a participant who is recognized by a domestic relations order as having a right to receive *all*, or a portion of, the benefits payable under a plan with respect to such participant.

(Emphasis supplied). "Benefits" or "Accrued Benefit" is defined to mean, "in the case of a plan which is an individual account plan [as at bar], *the balance of the individual's account.*" 29 U.S.C. § 1002(23)(B) (emphasis supplied).

Clearly, the PSA at issue

> *creates* or *recognizes* the existence of an alternate payee's [here the Children's] right to . . . receive *all* . . . of the benefits [*i.e.*, Norbert's individual account balance] payable with respect to a participant [Norbert] under a plan [the Plan].

To be certain, the QDRO at issue effected a total substitution of the Children, as alternate payees, for Norbert (as well as Linda), as participant, as the lawful recipient of *all* of Norbert's *and* Linda's Plan benefits. That was the bargain struck by Norbert and Linda in 1990, as found below.

Under ERISA, in order for a DRO to be "qualified," the order must specify:

- the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
- the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
- the number of payments *or* period to which such order applies, and

- each plan to which such order applies. 29 U.S.C. § 1056(d)(3)(C)(i)-(iv). (emphasis supplied).

The purpose of these requirements is

> to reduce the expense of ERISA plans by sparing plan administrators the grief they experience when because of uncertainty concerning the identity of the beneficiary they pay the wrong person, or arguably the wrong person, and are sued by a rival claimant.

Wheaton, *supra* at 1084. Stated another way, the irrefutable rationale for adhering to these requirements in establishing a QDRO is to remove the penchant for subjective determinations by plan administrators in construing the force and effect of QDROs. As noted by the court in *Wheaton*:

> The requirement of clear specification is designed to spare the plan administrator from litigation-fomenting ambiguities as to *who the beneficiaries* designated by the divorce decree are. (Id.) (emphasis supplied).

Congress' overriding concern in devising the criteria for QDROs, as demonstrated by the various courts which have wrestled with the issue such as the Seventh Circuit in *Wheaton*, undoubtedly was to limit or remove the possibility of confusion or error in the management of large, *multiemployer* plans administered by "outside" "professional" administrators, where confusion due to a lack of proper specification would require subjective determinations to be made by the plan administrators, thereby placing an undue burden upon administrators and beneficiaries alike. In *Wheaton*, for example, the benefits at issue were those involving a participant in General Electric's Employee Welfare Plan. *Id.* at 1081. This is in sharp contrast to the facts and circumstances at bar, which involved the administration of a small, family-owned and operated business and a profit-sharing plan administered by the family itself; indeed, the administrator was the participant himself, Norbert. Simply put, Lighting World was,

and is, no General Electric. Thus, the *raison d'etre* underlying Congress' concern for specificity in QDROs is non-existent in the matter at hand. This is particularly so where, as here, all that the parties intended by the QDRO was to substitute one beneficiary of *all* of the subject Plan benefits (the alternate payees) for another (the participants). Simply put, "all" means "all;" there is nothing ambiguous in that or any need for subjective decision — making of the type Congress sought to avoid.

The PSA adequately provides the specificity necessary to constitute a valid QDRO. The DRO here at issue (the PSA) specifies the "name [Norbert Belfer] and last known mailing address [1107 Channel Drive, Channel Towers, Monmouth Beach, Monmouth County] . . . of the participant", and the "name . . . of each alternate payee covered by the order [the Children]." Although it does not specify the Children's mailing addresses, under the circumstances at bar, that is not required. (*see Metropolitan Life Insurance Co. v. Wheaton*, *supra*; *Hawkins v. Commissioner*, *supra)* and the District Court here so held. (App. C at 27a).

The PSA also "clearly specifies" the "amount . . . of the participant's benefits to be paid by the plan to each such alternate payee. . . ." *See* 29 U.S.C. § 1056(d)(3)(C)(ii). It provides that Norbert (as well as Linda) "shall make the three children born of the marriage equal co-beneficiaries . . . of his . . . employee profit sharing plan." Clearly, that language "create[d] or recognize[d] the existence of [the Children's] right to . . . receive *all* . . . of the benefits payable with respect to [Norbert] under [the] plan." *See* 29 U.S.C. § 1056(d)(3)(B)(i)(I); and Chief Judge Thompson so found below. (App. C at 28a). Other cases construing similar contractual language similarly have so held.

For example, in *Metropolitan Life Insurance Co. v. Person*, 805 F. Supp. 1411 (E.D. Mich. 1992), the divorce decree provided, in relevant part and in analogous language to that of the PSA at bar:

> Both parties shall forthwith irrevocably designate the within minor child as beneficiary [sic] of any fringe benefit employer-funded life insurance policies which they may have by virtue of their present or future places of employment. . . .

Plaintiff contended that such language failed to meet the statutory requirements of specificity; the Court disagreed holding that such language sufficiently identified the beneficiary (to wit, the child) and:

> It plainly intends that the *full amount of benefits be paid* and it quite obviously refers to Paul Sova's employee life insurance. In short, the decree clearly contains the information specified in the statute that a plan administrator would need to make an informed decision. 805 F. Supp. at 1416 (emphasis supplied).

Similarly, in *Aetna Life Insurance Co. v. Hager*, 930 F. Supp. 343 (E.D. Wis. 1996), the court held the following language contained in a "Marital Settlement Agreement" to possess "enough specificity for purposes of ERISA":

> The respondent shall maintain in full force and effect, if available life insurance that is provided through his employment with the parties minor children named as sole and irrevocable primary beneficiaries . . . 930 F. Supp. at 345-46.

The District Court below agreed with Appellants' analysis, referencing the fact that other courts have construed similar language to that at bar to be sufficient to support a finding that the parties intended the designated payees to receive *all* of the subject benefits. (App C at 28a).

ERISA also requires a QDRO to identify "each plan to which such order applies." 29 U.S.C. § 1056(d)(3)(C)(iv). Here, the PSA specifically identifies the "employee benefit plan" as the "Lighting World, Inc. Employee Profit Sharing Trust Fund." Clearly, the

PSA "contains the information specified in the statute that a plan administrator would need to make an informed decision." *See Person*, *supra*, 805 F. Supp at 1416. There was only one pension plan maintained by Lighting World.

The Court of Appeals did not disturb any of these correct determinations. (App. A at 6a).

That leaves for consideration the one element that both lower courts found to be lacking (albeit without proper justification) — that the QDRO specify the number of payments *or* the period of payment to which the order applies. 29 U.S.C. § 1056(d)(3)(C)(iii). Despite the District Court's pronouncement that it

> concurs with those courts who have held that an overly exacting application of the technical requirements for a QDRO should not be used to defeat either the explicit intentions of the parties or the Congressional intent to protect the rights of former spouses and children,

(citation omitted) (App. C at 27a), the court inexplicably ruled that because the PSA itself did not make mention of a time frame for distributing the subject Plan benefits or the form in which the distribution should take (such as lump sum, annuity, *etc.*), it failed to qualify as a QDRO. In so holding, the District Court ignored the basic fundamental premise of the PSA: that the three Children born of the marriage were to be substituted for Norbert and Linda, and to be made, as of execution of the PSA, equal co-beneficiaries of each and all of Linda's and Norbert's Plan benefits. The Children were to receive all of Norbert's and Linda's Plan benefits, whenever an event of distribution would occur under the Plan, and to receive payment as stipulated in the Plan. By turning a blind eye to this basic, fundamental reality, the lower courts were able to evade that which Congress specifically chose to protect in its implementation of the REA.

"[N]othing in the plain language of [ERISA] exhorts domestic relations lawyers literally to mimic the statutory language when

drafting [QDROs]." *Hawkins v. Commissioner*, *supra*, 86 F.3d at 990. In *Hawkins*, a case remarkably analogous to the situation at bar, the Tax Court had determined that a "Marital Settlement Agreement" incorporated by reference into a divorce decree — which simply provided that the wife "shall receive as her separate property . . . cash of One Million Dollars . . . from [the husband's] share of the Arthur C. Hawkins, D.D.S. Pension" — did not qualify as a QDRO because the Agreement did not expressly designate, nor refer to, the wife as the "alternate payee," and further, did not satisfy the stringent requirements for satisfying a QDRO under I.R.C. 414(p), which is the companion provision for ERISA § 1056(d)(3)(C)(i)-(iv). The Tenth Circuit Court of Appeals *rejected* the Tax Court's reasoning and reversed its decision, holding as follows:

> We believe the Tax Court's reading of [ERISA] is unduly narrow. . . . The Tax Court's interpretation reads into section 414(p)(1)(A)(i) a requirement that the parties incorporate the exact statutory terminology when drafting a domestic relations order. Because section 414(p)(1)(A)(i) requires neither of these things, we believe the Tax Court's interpretation runs counter to the plain meaning of the statute.
>
> * * *
>
> We also reject the Tax Court's interpretation that section 414(p)(1)(A)(i) requires the parties to a domestic relations order to employ the term "alternate payee" in order to create a QDRO . . . Nothing in the plain language of section 414(p)(1)(A)(i) exhorts domestic relations lawyers literally to mimic the statutory language when drafting these agreements. Section 414(p)(1)(A)(i) simply requires the parties to execute a document which either "creates," "recognizes," or "assigns" rights under a qualifying plan to an alternate payee. We believe the language

contained in the Hawkins' Agreement adequately accomplishes this purpose.

By expressly stating that Glenda "shall receive" $1 million "from" the Plan, Paragraph 6(a) of the Agreement plainly "creates or recognizes" a contractual right in Glenda as an alternate payee to receive "a portion of the benefits payable" under the Plan. I.R.C. §414(p)(1)(A)(i). Additionally Glenda does in fact come within the statutory definition of an "alternate payee" even though she was not specifically designated as such by the Agreement. An alternate payee is "any spouse [or] former spouse [or a child, as at bar] . . . of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." I.R.C. §414(p)(8). As Arthur's former spouse, Glenda is an "alternate payee" because the Agreement gives her the right to receive "all, or a portion of," Arthur's Plan benefits.

* * *

Finally, we believe the legislative history of the QDRO exception supports our reading of section 414(p)(1)(A)(i). Prior to the enactment of the Retirement Equity Act, some courts had held that state law domestic support orders assigned or attaching pension benefits were preempted by ERISA's spendthrift provision. See S. Rep. No. 575, 98th Cong., 2d Sess. 20 (1984) reprinted in 1984 U.S.C.C.A.N. 2547,2564 (recognizing conflicting decisions). *Congress' primary intent in recognizing the QDRO exception was to clarify that these domestic support obligations did not fall within the scope of ERISA preemption*. See **Mackey v. Lanier Collection Agency & Serv., Inc.**, 486 U.S. 825, 838-39, 100 L.

> Ed. 2d 836, 108 S. Ct. 2182 (1988). The Tax Court's [lower courts'] narrow reading of section 414(p) [section 1056(d)(3)(C)(i)-(iv)] has the potential to frustrate this important congressional purpose by making it unreasonably difficult for domestic relations orders to qualify as QDROs. *Under the Tax Court's approach, spouses or children of plan participants would be precluded from receiving intended domestic support payments simply because the particular divorce decree failed to track the language of the statute even though the criteria of the statute were satisfied in substance.* See **Metropolitan Life Ins. Co. v. Wheaton**, 42 F.3d 1080,1085 (7th Cir. 1994). *Given the important legislative purpose behind the QDRO exception, we do not believe that Congress intended such an undesirable result.* 86 F.3d at 989-91 (emphasis supplied).

The petition herein should be granted so that the Court may address this important policy consideration and confirm the intent of Congress in creating the QDRO exception to ERISA's stringent anti-alienation provisions.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS, BY EXALTING FORM OVER SUBSTANCE, FAILED TO READ THE TERMS OF THE QDRO IN CONJUNCTION WITH THE PLAN DOCUMENT ITSELF

In furtherance of congressionally mandated policy to protect and preserve the interests of divorced spouses and their children in the pension benefits of their former spouses and/or parents, this Court should grant certiorari so that it can establish legal precedent for the following proposition: In construing a DRO and determining whether it meets the REA's requirements to constitute a QDRO,

the terms of the subject pension or profit-sharing plan itself should be read together with, and deemed to be incorporated in, the QDRO.

Pursuant to 29 U.S.C. § 1056(d)(3)(C)(iv), a QDRO is required to identify the pension or profit-sharing plan to which it applies. ERISA-qualified plans are required to specify the distributable events (*i.e.*, when the participant or other beneficiary would become entitled to receive a distribution thereunder) and the manner or number of payments to be made upon the occurrence of such events (*i.e.*, lump sum, *etc.*) 29 U.S.C. § 1056(d)(3)(ii)-(iii). The terms of the Plan should be read together with, and incorporated into, the terms of any QDRO. Indeed, the REA itself, in its negative covenants and in explicit recognition by Congress that the terms of a QDRO and of the Plan must be read and construed together, contains a prohibition on the QDRO altering the terms of the Plan (*see* 29 U.S.C. § 1056(d)(3)(D)(i)). This is especially true in cases such as at bar, where all that is intended to be effected by a QDRO is a substitution of beneficiaries, as opposed to an apportionment of payments between the participant and certain, specified alternate payees. Nonetheless, the District Court, here, interpreted the PSA in a vacuum, without reference to the Plan documents, as if the Plan documents did not exist. The Court of Appeals, without explanation, erroneously concluded that reference to the Plan "does not address [Petitioners'] rights and is of no assistance." (App. A at 7a).

However, as both the District Court and the Court of Appeals recognized in their respective Opinions, the Plan at issue *required* that a distribution of benefits be made on the occurrence only of certain specified events — disability, retirement, termination or death. (App. A at 8a). Moreover, although absent from the Court of Appeals analysis, the District Court noted that the Plan *required* that "the proceeds of the deceased's individual account were distributable in one lump sum. . . ." (App. C at 29a). Thus, both the "number of payments" and "the period to which such order applies" were specified.

Ironically, the District Court below recognized that, at least in certain circumstances,

> the timing and type of payments [may be supplied] from the circumstances . . . ma[king] it unnecessary for the relevant contract language to specify the terms of distribution.

(App. C at 28a). Yet, the District Court and Court of Appeals below refused to so find in this case because of Congress' "intent to provide for the retirement security of workers."

In distinguishing those cases where "courts . . . have accepted contract provisions similar to the one at issue," the District Court noted those courts "generally did so in cases involving life insurance benefits or the immediate distribution of pension benefits pursuant to an alimony or child support agreement." (App. C at 28a) (citations omitted). The Court of Appeals adopted the District Court's distinction. (App. A at 8a). Nevertheless, in "those" cases, just as in this case, an alternate payee was *substituted* as the "beneficiary" of plan benefits *in lieu of the participant*. The fact that the benefits at issue in "those" cases were life insurance benefits governed by a life insurance contract, as opposed to a 401(k) plan governed by an equally specific contract, is a distinction without a difference. In each case ("those" and at bar), the participant by contract agreed that *all* of his or her benefits under the subject plan should be paid to his or her alternate payees. The number of payments or the period to which they applied were supplied and governed by the plan document itself and cannot lawfully be changed. *See* 29 U.S.C. § 1056(d)(3)(D)(i). Those terms remain the same as if the original participant still were to receive the benefits. The Plan benefits at issue, as specified by the Plan, were "distributable in one lump sum upon the occurrence of certain events — disability, retirement, termination or death [of Norbert]" (App. A at 8a). There was, and is, no ambiguity. More importantly, the Plan Administrator, at the time Norbert sought distribution in violation of his promises in the PSA, had no

discretion but to follow the explicit terms of the PSA/QDRO and the Plan, which is exactly what she did.

The District Court's finding that "the 1990 agreement [failed] to establish any parameters whatsoever for when the subject benefits should be distributed . . ." (App. C at 30a), as well as the out of hand dismissal of Petitioners' argument by the Court of Appeals (App. A at 8a), ignored the incorporation, mandated by ERISA itself, of the Plan document into the QDRO. All means all. As found by the District Court, "[t]he designation of the children as 'equal co-beneficiaries' adequately establishes that the parties intended each child to receive one-third of the subject Plan benefits. . . ." (App. C at 27a).

Accordingly, Norbert's attempt (and subsequently those of his new spouse Corinne) to deny to the Children benefits which contractually were guaranteed to them by the PSA (in consideration of which their mother, Linda, forfeited valuable equitable distribution rights under New Jersey law) should have been rejected. The PSA was intended to be, is by its terms, and should be construed as, a QDRO. As aptly remarked by the Seventh Circuit in *Wheaton*:

> The domestic relations order was therefore specific enough to serve ERISA's purposes. To require more specificity would defeat the purpose of the provision creating an exception to inalienability for qualified domestic relations orders, at least in the present case, and for a purely theoretical gain in certainty. It is asking too much of domestic relations lawyers and judges to expect them to dot every i and cross every t in formulating divorce decrees that have ERISA implications. Ideally, every domestic relations lawyer should be conversant with ERISA, but it is unrealistic to expect all of them to be. We do not think Congress meant to ask the impossible, not the literally, but the humanly, impossible, or to make a suit for legal

> malpractice the sole recourse of an ERISA beneficiary harmed by a lawyer's failure to navigate the treacherous shoals with which the modern state-federal law of employee benefits abounds. *Wheaton*, *supra* at 1085.

Indeed, while this is "one of those rare cases [in which] the literal application of a statute will produce results demonstrably at odds with the intentions of its drafters," *Hurwitz v. Sher*, 982 F.2d 778, 781 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 2345 (1993) (*citing Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)), unfortunately, the ramifications flowing from the lower courts' determinations here could very well have a significantly detrimental impact on all spouses and children similarly situated to Petitioners herein.

CONCLUSION

This case presents a question of exceptional importance — whether congressional intent in providing an express exception to the "spendthrift" provisions of ERISA should be ignored due to perceived technical noncompliance with the precise terminology of ERISA. Ancillary to that determination is whether any real (as opposed to perceived) technical noncompliance with ERISA can and should be cured by reference to the plan documents in addition to the domestic relations order, where same would not frustrate, but would enhance Congress' intent in adopting ERISA. If there is to be any respect for the rights of marital litigants under property settlement agreements clearly constituting QDROs under ERISA, this Court should grant the petition for a writ of certiorari and in reviewing the case on the merits should reverse the lower courts' determinations on the establishment of a QDRO, and direct the distribution of the subject Plan benefits to Norbert's children, in whom he "created" and "recognized" a right to receive his Plan benefits in 1990, in exchange for valuable consideration given (or in this case, substantial rights forfeited) by the mother of those children. Petitioners respectfully urge this Court to not ignore the

clear contractual intent, required to be given effect by the REA and embraced within the PSA, and the equally clear contractual command that Norbert's Plan benefits were to be paid to his children, and not to himself, to his Estate, or to his new spouse. If for no other reason, this result is mandated to protect the rights of those "countless women who ha[ve] contributed to their families' financial well being [but who have] found themselves unable to obtain any pension benefits whatsoever upon divorce or death of the husband" (App. C at 23a).

Accordingly, Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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